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No. 94-1151

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

BERTHA FOOTMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims against the government, which are based on the allegedly negligent management of a swimming area on federal property, are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A13-A14) is unpublished, but the decision is noted at 37 F.3d 636 (Table). The opinion of the district court (Pet. App. A1-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. Pet. App. A13-A14. The petition for a writ of certiorari was filed on December 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 9, 1990, while attending a picnic with her family, seven-year-old Charlene Robinson drowned in a lake at the Kennedy Athletic, Recreation and Social (KARS) Organization Park No. 1. The park is on property owned by the United States National Aeronautics and Space Administration (NASA), and it is operated by the NASA Exchange—Kennedy Space Center (the Exchange), a non-appropriated fund instrumentality of the United States. The Exchange established the KARS Organization to promote recreational activities for NASA employees at the Kennedy Space Center. Pet. App. A2, A4-A5.

At the time of the accident, Mitchell Tidwell was responsible for the operation of the park, including its swimming area. Tidwell had received no instructions from the Exchange or the KARS Organization about lifeguard training or qualifications. In 1970, before Tidwell was hired, the KARS Organization had issued instructions for training lifeguards. Pet. App. A3, A4. The district court, however, found "no evidence that the Exchange or KARS organization informed Tidwell that he was required to enforce the 1970 lifeguard instructions," and that "the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards." *Id.* at A8. Petitioners do not challenge those findings in this Court. See Pet. 15. In 1990, Tidwell hired lifeguards who lacked lifesaving or CPR certification, neither of which was required by state law at the time. Pet. App. A4; Gov't C.A. Br. 14-15.

2. Petitioners filed this action in the United States District Court for the Middle District of Florida on their own behalf and as representatives of Charlene's estate. They sought damages from the United States

under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging negligence in the operation of the swimming area of the park.[1] The government argued, among other things, that petitioners' claims are barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).[2] The district court entered judgment for the government. Pet. App. A1-A12.

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[1] Petitioners also alleged pendent state-law claims against Tammy Footman. The district court declined to exercise jurisdiction over those claims after holding that petitioners' claims against the United States had to be dismissed. Pet. App. A2, A11-A12. The district court's dismissal of the pendent claims is not at issue in this Court.

[2] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, 28 U.S.C. 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The district court used the two-part approach for applying the discretionary function exception set out in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Pet. App. A6. The district court explained that, under that approach, a court "must first determine whether the challenged conduct violates a mandatory regulation or policy that allowed no judgment or choice"; if no such regulation or policy exists, such that the conduct is discretionary, a court then "must determine whether the challenged actions are the kind of conduct that the discretionary function exception was designed to shield." *Id.* at A7.

The district court determined that no mandatory regulations or policies governed decisions regarding the hiring or training of lifeguards at the swimming area. Pet. App. A8. Instead, as noted above, the court found that "the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards." *Ibid.* The court also determined that Tidwell's conduct was the type of conduct protected by the discretionary function exception. The court explained that "[t]he evidence show[ed]" that decisions regarding the lifeguards entailed a balancing of "safety factors and resource allocation." *Id.* at A10.

3. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment in an unpublished per curiam order. Pet. App. A13-A14.

ARGUMENT

The district court correctly determined, in a decision upheld without opinion by the court of appeals, that the question whether petitioners' claims are barred by the discretionary function exception to the FTCA is governed by the two-part approach this Court most recently enunciated in *United States* v. *Gaubert*, 499

U.S. 315 (1991). The district court's application of the *Gaubert* analysis to the facts of this case does not raise any question of broad legal importance and is consistent with decisions of other courts of appeals involving similar facts. Further review is therefore unwarranted.

1. "The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As this Court explained in *Gaubert*, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536).

The district court in this case properly applied these well-established principles by considering, first, whether the government conduct on which petitioners' claims are based was discretionary. Pet. App. A7-A8. The court correctly answered that question in the affirmative. *Id.* at A8. Petitioners now "concede that no mandatory regulations deprived [Tidwell] of discretion" in operating the swimming area. Pet. 15-16.

Having determined that the challenged governmental conduct was discretionary, the district court correctly turned to the question whether it involved the type of discretion protected by the discretionary function exception. Pet. App. A8-A11. The district court found that "[t]he evidence show[ed]" that the challenged decisions regarding the lifeguards "involved safety factors and resource allocation." *Id.* at A10. As the district court recognized, the consideration of such

factors has been held to bring a governmental decision within the scope of the discretionary function exception in cases, like this one, involving alleged governmental negligence in the maintenance of recreational sites on government-owned land. *Ibid.* (citing *Autery* v. *United States*, 992 F.2d 1523, 1527 (11th Cir. 1993), cert. denied, 114 S. Ct. 1829 (1994)); see also, *e.g.*, *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1108 (10th Cir. 1993); *Baum* v. *United States*, 986 F.2d 716 (4th Cir. 1993); *Ayer* v. *United States*, 902 F.2d 1038 (1st Cir. 1990).[3]

Petitioners contend that the discretionary function exception is inapplicable because Tidwell's position was "so low" that he was "only concerned with day-to-day management," and "not [with] pondering the social, economic or political implications of his decisions." Pet. 16. This Court made clear in *Gaubert*, however, that "[i]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies." *Gaubert*, 499 U.S. at 325 (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), and rejecting argument that exception did not apply because bank regulator was merely involved in "[d]ay-to-day management of banking affairs"). The Court also made clear in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion * * *, but on the nature of the

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[3] Having held that the government's conduct fell within the discretionary function exception, the district court found it unnecessary to decide whether that conduct breached a duty of care to Charlene Robinson. Pet. App. A2. Petitioners thus mischaracterize the district court's decision in asserting that the court relied on the exception to find that "the government did not owe the patrons of th[e] [swimming] facility any duty of reasonable care." Pet. 9.

actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Thus, petitioners' conception of the discretionary function exception cannot be squared with *Gaubert*.

2. Petitioners contend (Pet. 9) that the decisions below "directly conflict[]" with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). According to petitioners, *Indian Towing* stands for the broad proposition that, "where government voluntarily assumes a function not mandated by statute or regulation, it has an absolute duty to perform that function with reasonable care." Pet. 9. Petitioners also contend that lower courts have applied "[t]he 'good samaritan' rule established by this Court in *Indian Towing*" to hold the government liable on facts similar to those of this case. Pet. 12-13.

Petitioners confuse two quite separate issues. The good samaritan rule is a principle of tort liability embodied in the substantive law of many States. When the discretionary function exception applies, however, such substantive rules of liability do not come into play. Thus, even if the law of Florida (where the accident in this case occurred) imposed a "good samaritan" rule of the sort that petitioners attribute to *Indian Towing*, the question whether the challenged government action violated that rule does not arise if the discretionary function exception to the FTCA preserved the government's sovereign immunity from tort liability. The district court recognized as much when, after holding that the exception applies here, it declined to address whether the government had breached a standard of care. Pet. App. A2, A10-A11.

Moreover, *Indian Towing* does not establish a good samaritan rule as the test for determining the applicability of the discretionary function exception. The plaintiff there sought damages from the United States

for allowing the light in a lighthouse to go out. *Indian Towing*, 350 U.S. at 62. As this Court noted, the government did not argue that recovery was barred by the discretionary function exception to the FTCA. *Id.* at 64. Instead, the government unsuccessfully argued that recovery was barred because operating a lighthouse was a "uniquely governmental function[]." *Ibid.* Thus, the Court in *Indian Towing* had no occasion to address the scope of the discretionary function exception.

This Court has subsequently noted that *Indian Towing* nonetheless "illuminates the appropriate scope" of the discretionary function exception. *Berkovitz*, 486 U.S. at 538 n.3. The Court has explained that "[t]he United States was held liable" in *Towing* "because making sure the light was operational 'did not involve any permissible exercise of policy judgment.'" *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). Thus, *Indian Towing* illustrates a governmental decision that was not shown to involve discretion of the sort protected by the discretionary function exception. Nothing in *Indian Towing* suggests that, whenever the government voluntarily provides a service, it will be liable for injury caused by negligence in providing that service, even when the allegedly negligent conduct *does* involve the type of discretion protected by the exception. Accordingly, many lower courts have correctly refused to give *Indian Towing* a reading of the sort urged by petitioners. See, *e.g.*, *Fisher Brothers Sales, Inc.* v. *United States*, No. 93-1182 (3d Cir. Jan. 25, 1995) (en banc), slip op. 16; *Black Hills Aviation, Inc.* v. *United States*, 34 F.3d 968, 977 (10th Cir. 1994); *Baum*, 986 F.2d at 723.

Petitioners cite (Pet. 12-13) lower court decisions that they contend support their reading of *Indian Towing*. Petitioners' reliance on those decisions, all of which pre-

date *Gaubert*, is misplaced. Most of the decisions cited by petitioners rely on the same "nonexistent dichotomy between discretionary functions and operational activities" rejected in *Gaubert*, 499 U.S. at 326.[4] Two of the decisions cited by petitioners refused to apply the discretionary function exception because the challenged conduct violated a mandatory government policy, a circumstance that did not obtain here.[5] One decision cited by petitioners held that the challenged government conduct fell within the exception. See *Wiggins* v. *United States*, 799 F.2d 962, 966-967 (5th Cir. 1986) (exception applied to government's decision not to clear submerged piling from waterway, based on balancing economic and safety factors). Another decision cited by petitioners (Pet. 13), *Ross* v. *United States*, 640 F.2d 511, 519 (5th Cir. 1981) (per curiam), did not discuss the exception.

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[4] See *Caraballo* v. *United States*, 830 F.2d 19, 21-22 (2d Cir. 1987) (government could be held liable for implementation of discretionary decision to patrol diving area); *Mandel* v. *United States*, 793 F.2d 964, 968 (8th Cir. 1986) (government's failure to remove submerged rocks in waterway "involves operational level negligence at best"); *Butler* v. *United States*, 726 F.2d 1057, 1063 (5th Cir. 1984) (government could be held liable for "operational function[]" of repairing seawall); *Seaboard Coast Line R.R.* v. *United States*, 473 F.2d 714, 716 (5th Cir. 1973) (government could be held liable for "operational function of building [a] drainage ditch").

[5] *Mandel*, 793 F.2d at 967 (challenged government conduct was not within the exception because it was "operational" and, in the alternative, because it violated safety policy); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227, 233-236 (2d Cir.) (challenged government conduct violated Federal Aviation Administration Air Traffic Control Procedures Manual), cert. denied, 389 U.S. 931 (1967).

Finally, the remaining two decisions cited by petitioners are distinguishable on their facts.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] In *Huber* v. *United States*, 838 F.2d 398, 400-401 (9th Cir. 1988), the court held that an allegedly negligent attempt by the Coast Guard to rescue a ship did not involve discretion of the sort protected by the exception. In *Rise* v. *United States*, 630 F.2d 1068, 1072 (5th Cir. 1980), the court held that the exception did not bar allegedly negligent medical care.